SUBJECT INDEX

CASES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 153

EDMUND L. EBERT, ANDREW J. KEARY and ELLA R. KEARY,

Petitioners,

vs.

DR. HARRY P. POSTON,

Respondent.

BRIEF FOR THE PETITIONERS

Doctor Harry P. Poston, in May 1917, purchased some building lots situated in Hamtramck, Michigan. (R. p. 30). At the time, they were subject to a mortgage held by Andrew J. Keary and Ella R. Keary, his wife, which he assumed and agreed to pay. (R. pp. 30, 66). Doctor Poston defaulted in his payments, and under a power of sale in the mortgage contract (R. pp. 75-77), and in accordance with the Michigan law, which regulates the

exercise of such power (Exhibit 1 hereof), the lots were sold at public auction on February 5, 1918, (R. p. 71), and purchased by the petitioners, Mr. and Mrs. Keary. They paid therefor the entire amount due on the mortgage, including interest and costs. (R. pp. 70-75). On the same date a deed was given them by the sheriff. (R. p. 70.) It was duly recorded and placed in the custody of the Register of Deeds of the county. (R. p. 74).

On March 8, 1918, one month and three days after this sale, Congress passed the "Soldiers' and Sailors' Civil Relief Act". On September 29, 1918, seven months and twenty-four days after the sale, Dr. Poston entered the service in the army of the United States. (R. pp. 30, 66). On February 5, 1919, the period of redemption under the Michigan law expired. (Exhibit 1 hereof, Sec. 11). On May 14, 1919, the respondent received his honorable discharge from the service. (R. pp. 31, 66), and on his return to Detroit, and in July 1919, began and carried on some negotiations with the petitioner Ebert, looking to a settlement. (R. p. 31). Nothing came of these negotiations, and on November 19, 1919, he made a formal tender of a sufficient sum of money and asked for the return to him of the lots. (R. pp. 32, 67). This tender was refused and on August 19, 1920, this suit was instituted by Doctor Poston. (R. p. 2). In his bill of complaint he took the position that the provisions of the "Soldiers' and Sailors' Civil Relief Act" had prevented the period of redemption from expiring and had extended it for the full time he had spent in service. (R. p. 6). The Circuit Court of the County of Wayne, in which the suit first came to trial, held against this contention (R. pp. 62-64) and the matter was appealed by the Doctor to the

Supreme Court of Michigan. The latter court reversed the decree of the lower court and entered a decree in favor of the respondent in accordance with the prayer of his original Bill. (R. pp. 80-86). It did so, because in its opinion the provisions and general scope of the "Soldiers' and Sailors' Civil Relief Act" required this determination. Application was then made to the Supreme Court of the United States to review this decision and a petition for certiorari was filed August 20, 1923. The certiorari was granted December 11, 1923. (R. cover).

The sole question is: Is the position taken by the Michigan court correct? In the argument we oppose this position.

1. Because there is no ambiguity in Sections 205 and 302 of the Act of Congress.

(Federal Statutes Annotated—Supp. 1918, p. 812, Petition for Certiorari 15-35).

United States vs. Ewing, 237 U.S. 197.

2. Because neither the mortgage in question (Exhibit C, R. p. 75), nor the power of sale given by it are covered by the Act of Congress.

3. Because the property in question (Exhibit C, R. p. 75), was not "owned" by the mortgagor, nor subject to any mortgage, when the congressional act was passed.

Wood vs. Button, 205 Mich. 692, 701, 706;
Powers vs. Golden Lumber Co., 43 Mich. 468;
Conn. Mutual Life Insurance Co. vs. Cushman, 108 U. S. 51;

U. S. vs. Com. Etc., Trust Company, 193 U. S. 651.

4. Because the subject of redemption is covered by the congressional statute and in such a way as to demonstrate that the facts of this case are not within its terms.

Parker vs. Dacres, 130 U. S. 43;
Jones—Mortgages (5th. Ed.) Sec. 1051.
Sale held February 5, 1918—(R. p. 71).
Statute passed March 8, 1918—see above Military Service began September 29, 1918, (R. pp. 30, 66).

The opinion of the Michigan Supreme Court rests upon the theory that the right or privilege given by the Michigan statute to redeem from such a mortgage foreclosure sale, within one year of the sale, is a civil right or limitation, and that, while not expressly referred to in the "Soldiers' and Sailors' Civil Relief Act," this civil right or limitation is within the spirit, if not within the letter of that statute, and that the period of military service under Section 205 of the Federal Act must be added to the period of redemption fixed by Michigan statute law.

We submit that the letter of this statute is without ambiguity and in consequence there is no occasion to invoke its spirit.

Section 302 covers "secured obligations". (Petition for writ of certiorari 23). It has three paragraphs:

Paragraph 1 outlines and defines the obligations to which the act applies.

Paragraph 2 confers jurisdiction upon the courts, on its own motion or on application to it by a person in the military service "in any proceedings commenced in any court during the period of military service" to grant (a) a stay of the proceedings, or (b) make such disposition of the sale as may equitably conserve the interests of the parties.

Paragraph 3 forbids a sale under a power of sale or under a judgment entered if made during the period of military service, or within three months thereafter.

The language and its direct reference to "secured obligations" taken with the rest of the context, indicate very clearly that the act is here dealing with mortgages on real and personal property. There is no uncertainty or ambiguity in its meaning, and in consequence, it in itself is sufficient to determine the rights given or withheld respecting these kind of obligations.

United States vs. Ewing, 237 U. S. 197.

The mortgage here in question is dated September 25th, 1916. This fact would bring it within the language of the first and third paragraphs of Section 302. No one ever questioned this. It is one of the kind of "obligations" there referred to. Not withstanding this, it is not covered by this scetion, because the words of the section in paragraph 1 exclude it. The paragraph reads as follows:

> "Sec. 302. (1). (Secured obligations). That the provisions of this section shall apply only to obligations originating prior to the date of the approval of this Act and secured by mortgage, trust

> deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of military service and still so owned by him."

No distinction is made between mortgages on real and personal property. The Act applies with equal force to either if the secured obligation is on real or personal property "owned * * * at the commencement of the period of military service and still so owned."

To own or "owned" undoubtedly have, depending on the context and purpose of the legislature, a variety of limited meanings. In this statute Congress seeks to protect the interest of a soldier or sailor in property subject to a mortgage. Hence the word "owned" must refer to that kind of a title which is ordinarily in the mortgagor. Such an estate as would give security for a debt, and which could be sold and permanently pass to another, if the debt was not paid.

The facts in the case here presented are not within this language. The real estate pledged in this mortgage was not "owned" by Doctor Poston on March 8, 1918, nor was it "owned" by him at the commencement of the period of military service, which, in his case, was September 29, 1918. The real estate had been sold by the sheriff of Wayne County February 5, 1918. The Doctor's personal debt, his personal liability and the mortgage which covered these had been extinguished by this sale.

> *Wood vs. Button*, 205 Mich., 692, 701, 706,
> *Power vs. Golden Lumber Co.*, 43 Mich., 468,
> *Connecticut Mutual Life Insurance Co. vs. Cushman*, 108 U. S., 51.

While the facts in the last named citation are not identical with the case presented by the petitioners, there is enough of similarity to make the conclusions of the Court exceedingly pertinent.

The Insurance Company loaned W. H. W. Cushman Seventy-five Thousand Dollars on property located in Chicago, Illinois. The property was subsequently conveyed, subject to this mortgage, to W. H. Cushman, and after this conveyance the mortgage foreclosed. The law at the time of its execution gave the mortgagor about fifteen months in which to redeem and permitted the purchaser at the foreclosure sale to collect interest at the rate of ten per cent on the amount of his bid. A subsequent law reduced this percentage to nine per cent. After the sale, and during the period of redemption, Cushman offered to redeem. The company protested his redemption on several grounds, among them the change in the law as an impairment of its contract. The Court analyzes and defines the position of the parties when the sale was made, on page 64, as follows:

> "The rights of the purchaser at the decretal sale, if one was had, were not of the essence of the mortgage contract, but depended wholly upon the law in force when the sale occurred. The Company ceased to be a mortgagee when its debt was merged in the decree, or at least when the sale occurred. Thence forward its interest in the property was as purchaser, not as mortgagee."

If Doctor Poston had sold this property on February 5, 1918, no one would think of arguing that he still "owned" it thirty-three days after when Congress acted.

Because the sale actually took place, with his consent, as given and expressed in his mortgage contract, by action of the sheriff under the law, does this fact justify the argument and force the conclusion that within the meaning of this statute that property was still "owned" by him?

It is true he still had an interest in the land. An interest given him by law. He could remain in possession for one year, take the rents and profits,

Wagar vs. Stone, 36 Mich., 364, 366,

pay no taxes or insurance,

Walton vs. Hollywood, 47 Mich., 385,

and what interest remained to him could pass from him only by a written instrument,

Haak Lumber Co. vs. Crothers, 146 Mich., 575, 578,

but his former estate, the estate essential to ownership in the ordinary meaning of the term was gone. It had passed to the purchaser at the sale,

United States vs. Com. Etc. Trust Co., 193 U. S., 651,

and he could recover it in only one way, and that was by a payment in full within one year from the date of the sale. Unless the context warrants it, property so held is not referred to as property "owned."

Reference has already been made to the fact that the statute in question makes no distinction between mortgages on real and personal property. Perhaps some light

on its interpretation can be gained from a brief consideration of law on chattel mortgages. The rights given or withheld by these instruments generally are of each state's determination.

> "They are instruments for the transfer of property, and the rules concerning the transfer of property are primarily, at least, a matter of state regulation. We are aware that there is great diversity in the rulings on this question by the courts of the several states; but whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each state as decisive in respect to any sale arising therein."

Etheridge vs. Sperry, 139 U. S., 266, 277.

Many states hold that a chattel mortgage is a conveyance of the property to the mortgagee which becomes absolute on default. Others that it is merely a lien and title does not rest except on some form of foreclosure,

11 *Corpus Juris,* 398, Et. seq.

However, in either group, a sale settles the state of the title and on redemption proceedings—given by the decisions or statutes of the state—if the mortgagee has disposed of the property or converted it to his own use, the mortgagor is left to recover its value.

Jones—Chattel Mortgages (3rd Ed.), 684.

If the mortgage here in question was a chattel mortgage and a foreclosure sale had taken place on February 5, 1918, could anyone successfully contend that this mortgage was one of the "secured obligations" about which Congress was legislating thirty-three days after this sale or that the property covered by it was "owned" by the respondent "at the commencement of the period of military service and still so owned by him"?

We invoke another consideration:

The sale of February 5, 1918, changed the status of these parties. They were no longer under their former contract.

Conn. Mutual Life Insurance Company vs. Cushman, 108 U. S., 51.

The interest or right given by law to the one, and the estate procured by the other, the purchaser, became fixed and definite. While their respective interest grew out of their contract relationship, because of the law in existence when this contract was made,

Brownson vs. Kunzie, 1 Howard, 311,

nevertheless these interests were fixed and definite. They were property rights as distinguished from civil rights. Neither could be properly referred to as a "remedy" or a "limitation." And the question arises: Would Congress change or alter either of these estates without the consent of the parties and injure one or lessen the estate of one without providing for compensation for the injured or the lessened estate?

No one questions the power of Congress to pass the "Soldiers' and Sailors' Civil Relief Act." If in the legislative judgment this was a necessary measure for the successful prosecution of the war, its power could not be questioned. But in seeking to find the meaning of one of its enactments, property rights will not be deemed to be interfered with unless this intent is clearly indicated. When Congress acted this transaction was in the past. It had transpired and the ordinary law is prospective in its operation unless a different intent appears from the words employed.

Schwab vs. Doyle, 258 U. S., 529, 534.

Not only is the situation here presented not covered by the law, but its absence from it is so conspicuous that this fact should invoke commanding attention in defining the meaning of this statute.

The respondent has insisted that this subject of extending the period of redemption was an important subject and that it was the intention of Congress to cover this, as well as any other subject matter about which it was necessary to protect a soldier's interest, and that the inadvertence of not making reference directly to this period of redemption does not exclude it because of its ample inclusion in other portions of the statute. Nothing in the facts and nothing in the statute warrant any such argument. Congress cannot be presumed to be ignorant of the situation which prevails due to the various laws upon this question in the various States of the Union.

An equity of redemption exists in connection with every mortgage.

Parker vs. Dacres, 130 U. S., 43, 47.

In addition to this, many States have provided by statute for a period of redemption after sa

Jones—Mortgages (5th Ed.), Sec. 1051.

The language of paragraph 3, Section 302, leaves no doubt that neither redemption after sale nor equity of redemption were forgotten. There was no ignorance and no inadvertnce on this subject. Neither the one nor the other were forgotten or ignored. It is true when you say that "the equity of redemption" or "the period of redemption" is not, in expressed terms, covered by the Act, a literal truth is spoken, but if no analysis is made of paragraphs 2 and 3, Section 302, the whole truth is not presented.

Paragraph 2 as already pointed out, gives a court jurisdiction and authority on its own motion, or on application of a person in the military service, or of some one on his behalf "in any proceeding commenced in any court during the period of military service to enforce such obligation arising out of non-payment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service, (a) to stay the proceeding, or (b) make such other disposition as will equitably conserve the interests of the parties."

This paragraph was not invoked in this case. No court was asked to adjudicate upon this situation until one year and three months after the period of military service had terminated.

Paragraph 3 provides that no sale shall be valid if made during the period of military service, or within three months thereafter, except under a certain condition set forth in the statute. Now—

First. At the time this sale took place no law gave the Court the jurisdiction here spoken of.

Second. Both the period of redemption and the equity of redemption are covered by this statute.

Third. The manner in which they are covered show that the facts in this case are outside of this statute.

The language of this paragraph provides that no sale under a power of sale, and no sale under a judgment entered shall be valid except under certain conditions. In mentioning these two methods of foreclosure, the whole subject is covered. In those States where the period of redemption is given by statute law, it does not start until the sale is had. In those States where there is no period of redemption given by statute law, the equity of redemption terminates with the sale. Consequently by forbidding a sale, in either case (except on conditions not here important, because this law was not then in existence) the period of redemption in those States which give it, by statute law, it could not begin until three months after the termination of the period of military service, while the equity of redemption, which would end with the sale, would not terminate until three months after the termination of the period of military service. From this we argue that both the period of redemption and the equity of redemption are covered by paragraph 3, section 302. If a sale took place before the

law came into existence and that sale fixed the rights of the parties, that sale is outside of this statute and the parties interested in that sale are outside the protection given by this statute.

This mortgage having passed out of existence before the Act came into effect, is not covered by Section 302. The power of sale having been exhausted before the Act came into effect is not covered by Section 302.

Walton vs. Hollywood, 47 Mich., 385, 389.

The period of redemption in this case given by the Michigan statute having started before the Act was passed, is not covered by Section 302. The Act having designedly, by staying the power of sale in all cases, covered the whole subject of redemption, a supposed right resting on what is thought to be the intent of the lawmakers, should not be forced into the Act by a reference to some section which would make the section referred to and Section 302 incongruous.

The Michigan Supreme Court, after quoting Sections 205 and 302, said "But we think the Act should be construed liberally to accomplish the congressional purpose indicated in the Section quoted". (R. p. 82). The Section quoted from the context means Section 205. Excerpts from two cases in the Supreme Court of the United States are used to justify this interpretation.

Stewart vs. Kahn, 11 Wall. 493;
Ozawa vs. United States, 260 U. S. 178.

In *Stewart vs. Kahn,* the court had before it an Act of Congress, passed June 11, 1864, "in relation to the limita-

tion of actions in certain cases", and held it was not prospective alone in its operation, but applied to all cases where the plaintiff could not prosecute his suit by reason of the rebellion.

In *Ozawa vs. United States* the court had under consideration two separate statutes applying to naturalization, to-wit, the Naturalization Act of June 29, 1906, and Section 2169 of Revised Statutes. The contention was that the Act of June 29, 1906, was complete in itself and by implication repealed that provision of the other section which permitted naturalization only to "free white persons". The court in its disposition of the matter made use of the language quoted by the Michigan Supreme Court and refers to,

> *Holy Trinity Church vs. U. S.* 143 U. S. 457;
> *Heydenfeldt vs. Daney Gold Mining Company,* 93 U. S. 634.

None of the cases cited extend the power of interpretation as far as the Michigan Supreme Court did in this case. No one questions the right of the court to ascertain from the whole Act the legislative intent as that intent appears from a consideration of the whole Act, nor does anyone contend that words may not be suppressed or given a meaning consonant with the purpose of the legislation. Mr. Justice Brewer, who delivered the opinion of the court in the Holy Trinity case, found occasion later to again discuss this question, when he said—"It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional and only arise where there are cogent reasons for believing that the

letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute".

United States vs. Goldenberg, 168 U. S. 95, 103.

If the statute here in question had not mentioned the subject of mortgages and contained general language which obscurely applied to them and other matters, from such general language a court could rightfully say mortgages were covered. But when in the face of Section 302 (secured obligations) and a mortgage which it is admitted does not come within the language of this Section, a court forces this mortgage into Section 205, and in doing so ignores the express and implied meaning of that Section, it is, we submit, evidently of the opinion that (to paraphrase the language of Mr. Justice Brewer) this omission, this failure to provide for this contingency justifies a judicial addition to the language of the statute.

Massachusetts, Alabama and Minnesota construe this Act as not applying to mortgage sales had while the mortgagor was not in military service. The force of these decisions in petitioner's favor is augmented by the fact that the sales under consideration were held after the passage of the Act.

Belle vs. Buffinton, 137 N. E. (Mass.) 287;
Morse vs. Stober, 233 Mass. 223;
John Hancock Mut. Insurance Company vs. Lester, 234 Mass. 559;
Wood vs. Vogel, 204 Ala. 692;
Taylor vs. McGregor State Bank, 144 Minn. 249.

The Michigan court, to use the words of the opinion, said: "The Act does not in precise terms refer to a limitation or foreclosure such as this", but because of what the court concluded was the intent of the lawmakers, it held the Act to apply. When you attempt to fit the facts of this case to this view of this law, you are met with very serious problems. These only emphasize the position herein taken. Under the Michigan law the right to redeem from this sale expired February 5, 1919, (Exhibit 1 hereof Dec. 11). Michigan's conclusion is that this right was extended for the period of the military service by Section 205. It might be asked, why not 204 or 302 or 301 or 500? Any one of these sections would fit as well as 205.

Section 204 gives jurisdiction over any stay ordered by any court under the provisions of this Act, and permits the modification thereof. Section 302 permits the stay already referred to. Section 301 provides for protection under contracts made for the purchase of real estate. Section 500 provides for the protection given when taxes and assessments fall due. Any of these will fit the facts as well as 205, because 205 says: "that the period of military service shall not be included in computing any period limited by any law for the bringing of any action by or against any person in military service".

No action was brought. The sale happened thirty-three days before the Act was passed, and seven months and twenty-two days before the Doctor entered the military service. These facts and this language of Section 205 obviously have no relation to one another. Here we are concerned with definite estates in land. The one possessed by the Doctor, and the one possessed by the purchaser at the

sale would not be referred to as a "limitation" in bringing any action in court, and the very fact that such a section as 205 is selected to grant the relief asked, leads very effectively to the conclusion that this law does not and was not intended to apply to such a situation as these facts present.

Inasmuch as from the foregoing, (1) the mortgage in question was no longer in existence when the Act of Congress was passed; (2) the property in question was not subject to any mortgage when the Act was passed; (3) the property in question was not "owned" by the respondent when the Act was passed; (4) the power of sale in the mortgage in question had been exhausted when the Act was passed; (5) there are no words in the statute to indicate that its provisions apply to completed transactions, and (6) the letter of the law is clear and unambiguous covering the whole subject of redemption, in such manner as to make it plain that the facts of this case are not within its terms, we ask for a reversal of the conclusions reached by the Michigan Supreme Court.

Thos J. Bresnahan,
Elmer H. Groefsema,
P. J. M. Hally,
Attorneys for Petitioners.

EXHIBIT 1.

COMPILED LAWS OF MICHIGAN, 1915.

Chapter 249.—Foreclosure of Mortgages by Advertisement

(14949.) SECTION 1. Every mortgage of real estate, containing therein a power of sale, upon default being made in any condition of such mortgage may be foreclosed by advertisement, in the cases and in the manner hereafter specified.

(14950.) SEC. 2, To entitle any party to give a notice as hereinafter prescribed, and to make such foreclosure, it shall be requisite:

1. That some default in a condition of such mortgage shall have occurred, by which the power to sell became operative;

2. That no suit or proceedings shall have been instituted at law, to recover the debt then remaining secured by such mortgage, or any part thereof; or if any suit or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered therein has been returned unsatisfied, in whole on in part; and

3. That the mortgage containing such power of sale has been duly recorded; and if it shall have been assigned, that all the assignments thereof shall have been recorded;

4. In cases of mortgages given to secure the payment of money by installments, each of the installments mentioned in such mortgage after the first, shall be taken and deemed to be a separate and independent mortgage, and such mortgage for each of such installments may be foreclosed in the same manner, and with the like effect, as if such separate mortgages were given for each of such subsequent installments, and a redemption of any such sale by the mortgagor shall have the like effect as if the sale for such installments had been made upon an independent prior mortgage.

(14951.) SEC. 3. Notice that said mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given by publishing the same for twelve successive weeks, at least once in each week, in a newspaper printed in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated, if there be one; and if no newspaper be printed in such county, then such notice shall be published in a paper published nearest thereto.

(14952.) SEC. 4. Every such notice shall specify:

1. The names of the mortgagor and of the mortgagee, and the assignee of the mortgage, if any;

2. The date of the mortgage, and when recorded;

3. The amount claimed to be due thereon at the date of the notice and

4. A description of the mortgaged premises, conforming substantially with that contained in the mortgage.

(14953.) SEC. 5. The sale shall be at public vendue, between the hour of nine o'clock in the forenoon and the setting of the sun, at the place of holding the circuit court within the county in which the premises to be sold, or some part of them, are situated, and shall be made by the person appointed for that purpose in the mortgage, or by the sheriff, under sheriff, or a deputy sheriff of the county, to the highest bidder.

(14954.) SEC. 6. Such sale may be postponed from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication until the time to which the sale shall be postponed, at the expense of the party requesting such postponement.

(14955.) SEC. 7. If the mortgaged premises consist of distinct farms, tracts, or lots not occupied as one parcel, they shall be sold separately, and no more farms, tracts or lots shall be sold than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest and the costs and expenses allowed by law; but if distinct lots be occupied as one parcel, they may in such case be sold together.

(14956.) SEC. 8. The mortgagee, his assigns, or his or their legal representatives, may, fairly and in good faith, purchase the premises so advertised, or any part thereof, at such sale.

(14957.) SEC. 9. The officer or person making the sale shall forthwith execute, acknowledge, and deliver to each purchaser a deed of the premises bid off by him; and if the lands are situated in several counties, he shall make

separate deeds of the lands in each county, and specify therein the precise amounts for which each parcel of land therein described was sold. And he shall indorse upon each deed the time when the same will become operative in case the premises are not redeemed according to law. Such deed or deeds shall, as soon as practicable, and within twenty days after such sale, be deposited with the register of deeds of the county in which the land therein described is situated, and the register shall indorse thereon the time the same was received, and for the better preservation thereof, shall record the same at length in a book to be provided in his office for that purpose, and shall index the same in the regular index of deeds; and the fee for recording the same shall be included among the other costs and expenses allowed by law. In case such premises shall be redeemed, the register of deeds shall, at the time of destroying such deed, as provided in section twelve of this chapter, write on the face of such record the word "Redeemed," stating at what date such entry is made, and signing such entry with his official signature.

(14958.) SEC. 10. Unless the premises described in such deed shall be redeemed within the time limited for such redemption, as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter, except as to any parcel or parcels which may have been redeemed and cancelled, as hereinafter provided; and the record thereof shall thereafter, for all purposes, be deemed a valid record of said deed, without being re-recorded; but no person having any valid subsisting lien upon the mort-

gaged premises, or any part thereof, created before the lien of such mortgage took effect, shall be prejudiced by any such sale, nor shall his rights or interests be in any way affected thereby.

(14959.) SEC. 11. If the mortgagor, his heirs, executors, administrators, or any person lawfully claiming from or under him or them, shall, within one year from the time of such sale, redeem the entire premises sold, by paying to the purchaser, his executors, administrators, or assigns, or to the register of deeds in whose office such deed is deposited, for the benefit of such purchaser, the sum which was bid therefor, with interest from the time of the sale at the rate per cent borne by the mortgage, not exceeding ten per cent per annum, and in case such payment is made to the register of deeds, the sum of one dollar as a fee for the care and custody of such redemption money, then such deed shall be void and of no effect; but in case any distinct lot or parcel separately sold shall be redeemed, leaving a portion of the premises unredeemed, then such deed shall be inoperative merely to the parcel or parcels so redeemed, and to those portions not so redeemed shall remain valid and of full effect.

Supreme Court of the United States

OCTOBER TERM, 1923

No. 512

EDMUND L. EBERT, ANDREW J. KEARY, AND ELLA R. KEARY, PETITIONERS,

vs.

DR. HARRY P. POSTON, RESPONDENT.

PRINTED ARGUMENT AND BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

The statement of facts in the petition and brief of petitioners is substantially correct except that it is important to add, for reasons which will be more fully hereinafter emphasized, that on December 17th, 1919, notice of respondent's claim of rights had been recorded in the office of the Register of Deeds for Wayne County, Michigan (Ex. 7, R. 124).

The respondent's Bill of Complaint was founded upon the following theories:

I.

"There was no proof of a legal mortgage foreclosure by the petitioners.

II.

If the mortgage foreclosure sale was legal, the rights of plaintiff as of the date of his entry into military service on September 24th, 1918, were preserved to him by the provisions of the Soldiers and Sailors Civil Relief Act, so-called.

(a) Because of the provisions of Section 205 staying the running of the period for redemption.

(b) Because of Section 202 in that divesting plaintiff of his legal title by permitting the expiration of the redemption period while he was in military service would be a 'penalty incurred while plaintiff was in the military service and his ability to pay was thereby materially impaired.'

(c) Because of Section 301 preventing defendants from terminating the contract or resuming possession of the property for non-payment, 'during the period of such military service except by action in a court of competent jurisdiction.'

(d) Because of the provisions of Section 302, (2) read together with Section 301 (1), which by reason of defendants' failure to comply therewith, prevented a court from exercising the equitable jurisdiction conferred by Section 302 (2) (a) (b).

(e) Because Sections 100 and 603 of the Soldiers and Sailors Civil Relief Act, read together with the provisions hereinbefore referred to, make it conclusively appear that the 'transaction' in question in this case, under a proper construction of the Act, comes within the protection of the Soldiers and Sailors Civil Relief Act.

III.

(a) Because this Michigan Court of Equity, under the established facts in this case, and under the Michigan decisions applying thereto, as well as under the special equitable jurisdiction conferred by the Soldiers and Sailors Civil Relief Act, has the power to give relief and should exercise it.

(b) Because the conduct of the defendants in negotiating for purchase by them from plaintiff of the property in question, constitutes a recognition of the mortgage as a continuing mortgage; a waiver of the foreclosure and an estoppel to set up the foreclosure."

It will appear from the foregoing that so-called Federal questions were not the sole ones which the Michigan Supreme Court passed upon, so that if its determination of the issues presented by respondent's Bill of Complaint as indicated by the decree signed by the Michigan Supreme Court, can stand independently of the Federal question as passed upon, this court should not issue a Writ of Certiorari.

Respondent insists:

(A) That the Michigan Supreme Court had jurisdiction of this cause and exercised it as shown *by its decree* independently of any Federal Statute:

(1) Because the conduct of the petitioners in negotiating for purchase by them from respondent of the property in question, constituted a recognition of the mortgage as a continuing mortgage; a waiver of the foreclosure and an estoppel to set up the foreclosure.

> "*Wiltse on Mortgage Foreclosures, 3rd Ed., Vol. 2, p. 1659.*
>
> 'Sec. 1255. Waiver.—The extinction by the running of the Statute of Limitations of the right of the mortgagor, or those claiming under him, to redeem, may be waived by an Act of the mortgagee, or the owner of the mortgage, which indicates a disclaimer of the foreclosure, and presumptively leaves the mortgage subject to redemption in equity; *such as doing any act which shows that the party treats the debt as still due, and the account as still open, and the extinguishment of the mortgagor's equity affected by judicial action, is still subject to be waived by an admission on the part of the mortgagee.*
>
> Sec. 1256. By Acknowledgment. — Any acknowledgment on the part of the mortgagee, or those in privity with him, of the right of the mortgagor to redeem, will prevent * * * the bar of redemption, *such as an admission of the existence of the debt,* whether oral or in writing; * * * letter written containing admissions of the existence of the mortgage and of the rights of the mortgagor; * * * *or rendering an account of the amount due on the mortgage debt'.*"

See also:

> *Williams v. Bolt, 170 Mich., 517. (See Ex. 11, R. 126).*

Exhibit 11 is dated July 24th, 1919, and the material part reads as follows:

"Dear Sir:

Below please find figures showing *Amount due on Lots* 32, 35, 37, 41, 43, 45 and 47, Sunnyside Subdivision, *Mortgaged Sept. 25/16, by Eddie E. Hulett and wife.*

Interest is computed to Aug. 5, 1919, BUT DEDUCTION CAN BE MADE SHOULD PAYMENT BE MADE BEFORE THAT DATE.

Yours truly,

(Signed) A. J. Keary.

Due Aug. 5, 1919.....$1,945.39."

(2) Because respondent's claims as set forth in his Bill of Complaint and supported by the testimony in the record, established sufficient facts to confer jurisdiction upon the Michigan Supreme Court to warrant the entering of the degree on file under the claim of respondent that before entering the military service, he was advised by counsel that he was protected by the Soldiers and Sailors Civil Relief Act, and that he relied thereon (R., p. 62).

Schroeder v. Young, 161 U. S., 334.
Hunt v. Rousmanier's, 8 Wheat 174, 215; 5 L. Ed. 589, 600.
Millard v. Truax, 50 Mich., 343.
McIntyre v. Wyckoff, 119 Mich., 557.
Brown v. Burney, 129 Mich., 204.
Williams v. Bolt, 170 Mich., 517.
Dalton v. Weber, 203 Mich., 453.
Benson v. Bunting, 59 Pac. 991, (Calif).

* * * * *

Rule No. 3 of this court, provides:

> "This court considers the former practice of the courts of kings bench and of chancery in England as affording outlines for the practice of this court."
>
> "He who comes into a Court of Equity must come with clean hands."

This Court of Conscience and Equity will not steep and blacken its hands in the swamp and mire of inequity, fraud, conspiracy, and perjury of the petitioners in this cause in an effort to find equities for them.

Ex. G, R. 146, is dated December 18th, 1919, and purports to have been acknowledged on the same date, although not recorded until April 26th, 1920. The notary public in the acknowledgment gives the expiration of his commission as March 29th, 1924, a commission which he did not get from the Governor of Michigan until March 29th, 1920. The petitioners, Ebert and Keary, swear that the deed was executed and acknowledged, and the consideration delivered on December 18th, 1919 (Keary, R. 50, 52, 82; Ebert, R. 95).

This attempt to deceive the court by setting up petitioner Ebert as a *bona fide* purchaser for value without notice from petitioner Keary was abandoned by petitioners in their brief to the Michigan Supreme Court as commented upon in the opinion of the Michigan Supreme Court when they were so clearly caught red-handed in the fraudulent dating back of their deed.

It must be clear upon this record that Exhibit 11, written by the defendant Keary on July 24, 1919, five and one-half months after what the petitioners are now claiming was the expiration date of respondent's right

of redemption, was because of the belief on the part of the petitioners (probably on the advice of counsel), that the period of military service must be excluded in computing the time to redeem. This explains his subsequent conduct when the petitioner, Ebert, conceived and endeavored to carry into execution his fraudulent plan to appear to be negotiating to purchase the property from respondent so that in the interim and during that period the right to redeem might actually expire. The trial court and the Michigan Supreme Court found that this fraudulent conduct constitutes an estoppel in law.

The shameful manner in which petitioner sought to take advantage of the weakness in the Michigan statutory foreclosure by advertisement through power of sale clause mortgages (which is satisfied by advertisement in an obscure legal paper without registered mail notice or otherwise to the mortgagor or his assigns) is evident from the fact that while the petitioners notified respondent on September 1, 1917, when the mortgage was about to become due (Exhibit 4, R. 142), and notwithstanding they knew the doctor's address in the David Whitney building, they at no time notified him of the mortgage foreclosure, at which they themselves purchased the property. The first that the doctor knew of the mortgage foreclosure was in September, 1919, when he was in the military service, and he sent his friend, William W. Warren, to the office of Mr. Ebert to pay past due interest on the mortgage (Warren, R. 70).

At that time, therefore, as admitted by petitioners, they knew that the respondent was in the military service (Keary R., p. 85; Ebert R., p. 92).

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They knew of the existence of the Soldiers and Sailors Relief Act and of the moratorium thereunder. If they thought notwithstanding the soldier was in the military service, they should be permitted to have their mortgage foreclosure sale become absolute, there were provisions in the Relief Act, by which upon their application to the court therefor, the court would appoint an attorney to represent the absent soldier's rights. As was indicated by the Michigan Supreme Court in its opinion, evidently in that situation the court would not have permitted the mortgage foreclosure sale to become absolute, particularly where there is ample testimony in this record from which it could be found that, in the language of the Relief Act:

> "By reason of such service the ability of such person to pay or perform was thereby materially impaired," or "Unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service."

Surely no one will contend that the government of the United States has done more for its world war soldiers than it should have done. Surely the protection which this court has given the respondent in this case is not more than the fundamentals of the most simple justice require. Surely this respondent doctor, urged by the call of generations of patriotic ancestors, identified with the history of the Nation since 1650, Governors and Judges, soldiers in every war, who enters the military service and makes the sacrifice entailed by leaving his wife and child as the recipients of the charity of friends and relatives, leaving and destroying a flourishing medi-

cal practice, should not be penalized by having an unmarried man, multi-millionaire land contract discount and mortgage loan shark by the name of Ebert, have the soldier respondent's property forfeited to him in his absence.

It must be borne in mind that the title of the mortgagor respondent in and to the property in question, notwithstanding petitioner's claim to the contrary, had in no whit changed, so far as the legal title was concerned, by the mortgage foreclosure sale under Michigan law, and that respondent's rights came within the meaning of the words of the Relief Act, and—

> "Secured by mortgage * * * on real property owned by a person in military service, *and still owned by him.*"

See the opinion of Mr. Justice Cooley in—*Whiting v. Butler, 29 Michigan, 128*, especially page 129. Also *Bunn v. Brassuell, 515 S. E. 930.*

The mortgage sale gave to the mortgagees, purchasers, petitioners, at the sale merely an equitable title with the legal title remaining in respondent with the right to use, income, and profits from the property.

We here quote appropriate language from *Mullett v. Mullen, 49 Atl., 874 (Maine):*

> "The 'right to redeem the same' from the purchaser was extended to both. This was not a mere right to purchase, giving no present title. It was expressly a 'right to redeem.' That phrase, in law, implies more than a right to acquire. It implies a right to disencumber (to liberate) from a lien or claim. *Cent. Dict.*"

So that it will be noted that the Michigan Supreme court had jurisdiction under the proven facts in this case as a court of equity, to enter the decree filed, independent of the equitable jurisdiction expressly conferred upon all courts by the Relief Act, particularly:

> "If it shall appear that the person who would suffer by such fine or penalty was in the military service when the penalty was incurred, and that by reason of such service, the ability of such person to pay or perform was thereby materially impaired."

It appears clearly from the testimony that the doctor respondent left his wife and child to receive aid from relatives and gave up a flourishing practice to enter the Military Service, with accruing liabilities for life insurance alone of between fifteen hundred ($1500.00) and two thousand ($2000.00) dollars, per year, and that when he returned from the service, he was heavily in debt, and that also he was unable to immediately obtain an office (Poston R., 66).

We take it for granted that where a court has equitable jurisdiction, the determination as to whether or not the facts sufficiently appeal to the court's conscience to grant relief will not be reviewed or interfered with by this appellate court.

Equitable jurisdiction is conferred by the Relief Act where:

> "By reason of such service, the ability of such person to pay or perform was thereby materially impaired,"

or—

> "Unless in the opinion of the court the ability of the respondent to comply with the terms of

> the obligation is not materially affected by reason of his military service."

As was said by the trial court in its opinion (R., 114):

> "Undoubtedly the legislation in question is a valid exercise of power on the part of Congress for the commendable purpose of relieving the mind of the soldier from the worries of civil life and enabling him to devote his entire energies to the military needs, *and it is therefore apparent that a suspension of the running of a statutory period for redemption from a foreclosure would subserve such a purpose.*"

As the Relief Act itself puts it:

> "In order to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the nation."

* * * * *

Counsel for petitioners have fallen into the error of insisting upon a strict construction of the Relief Act.

In determining the applicability of the Federal law to the facts disclosed by the testimony, ordinarily the rule would be that a statute in derogation of the common law, contract provisions, or other statutes, must be strictly construed so that unless it plainly expresses itself to the contrary, it does not conflict with existing statutes, common law, contract provisions, etc.

But opposed to this ordinary rule of construction is the rule that a Federal law, like the one involved in this case, which is a remedial one, intended to protect the special wards of the Government and afford them every

privilege, right, benefit, immunity, and relief possible, must be LIBERALLY construed so as to effectuate its before-mentioned remedial purposes.

Kuehn v. Neugebauer, 216 S. W., 261 (Texas).
Halle v. Cavanaugh, 111 Atl. 78, (N. H.).

See also:

Ozawa v. United States, U. S. Sup. Ct. Nov. 1922, Adv. Sheets.
People v. Michigan Central Railroad, 145 Mich., 164, 165 and 166.
Hatch v. Calhoun Circuit Judge, 127 Mich., 174; Endlich, Interpretation of Statutes; Lewis Sutherland, Statutory Construction, (2nd. Ed.).

The congressional proceedings showing the debates in Congress on the Relief Act preliminary to its passage, indicate very clearly that the proponents of the Bill anticipated that they could not and did not foresee and provide for every possible instance in which they desired protection to be afforded under the Relief Act. It was because of this fact that they provided a broad general equitable jurisdiction so that where an equitable case could not be brought within the provisions of the wording of the specific rules, protection could, none the less, be given by reason of the power of the court in appropriate circumstances within its discretion under the broad general equitable provisions specially inserted in the act for the purpose.

To recapitulate—

The Writ of Certiorari should not issue because:

1. This court is guided *by the decree* of the Michigan Supreme Court (and not by its opinion), and that decree is warranted by Michigan law.

(a) As a matter of equity and the power of the court to relieve under circumstances of fraud, accident and mistake of law or fact.

(b) Because the same facts of hardship by impairment of ability to meet the obligation by reason of military service for which the Relief Act gives special jurisdiction is a jurisdiction which the Michigan court had *independent* of the Federal statute under its own decisions.

(c) Because of recognition of the mortgage as a continuing obligation (Ex. 11, R. 126) and the estoppel against petitioners to claim expiration of equity of redemption as found by trial court and affirmed by Michigan Supreme Court.

(d) Because if the Michigan Supreme Court exercised equitable jurisdiction under the Federal statute (rather than by its interpretation of extension of statute of limitations time for redemption), this court will not interfere with the lower court's opinion of equities of parties so long as the lower court had jurisdiction.

(e) Because the amount involved and academic interest make it inadvisable to review.

(f) Because right to review is not absolute and petioners are so immured in fraud and conspiracy that

this court of equity and conscience will not aid them to the extent of review.

("He who comes into a Court of Equity must come with clean hands.")

This case is academic in its value as a precedent for future guidance inasmuch as the time elapsed since the conclusion of the World War makes it improbable that any cases of a like nature can arise under the Relief Act.

Under the circumstances of this case as hereinbefore set forth, and the law applicable thereto, and because of the fact that the amount involved in this case as attempted to be brought before this court, is slightly less than Two Thousand ($2,000.00) Dollars (the amount fixed by the Michigan Supreme Court to redeem from the mortgage in question), we believe that the application for a Writ of Certiorari should be denied.

Respectfully submitted,

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